ORIGINAL CRIMINAL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Wilson and Mr. Justice Norris.

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February 7.

QUEEN-EMPRESS *v.* BARTON.*

Merchant Shipping Act, 1854 (17 and 18 Vic., c. 104.), s. 267.—Trial of British Seamen for offences committed on British ship on the High Seas—Procedure at such trial—Murder—Admiralty Courts—British Seamen on British ship—Letters Patent, High Court 1865, cl. 26—Case certified by Advocate-General.

A British seaman, who stood charged with the murder of a fellow sailor on board a British ship on the high seas, was tried by a Judge of the High Court, under the Code of Criminal Procedure; the chief evidence against the prisoner being that given in the depositions of the Captain and Second Officer of the ship, taken on commission; this evidence was admitted in evidence and the prisoner was convicted and sentenced.

It was objected, that, under s. 267 of the Merchant Shipping Act of 1854, the prisoner ought to have been tried in every respect, as though the trial had been held at the Central Criminal Court in London, and that the law of evidence to be applied was that prevailing in England. *Held*, on a case certified by the Advocate-General under cl. 26 of the Letters Patent, that the prisoner had been properly tried according to the ordinary practice of the High Court, and that the evidence was admissible against him.

CASE certified by The Advocate-General (Sir Charles Paul) under cl. 26 of the Letters Patent of 1865.

"William Barton was indicted before Mr. Justice Norris at the 6th Criminal Sessions of 1888, for the murder of one William Malone on board the British ship *Desdemona* on the high seas on the 2nd July 1888.

"The indictment, as originally framed, was to the following effect:—

"'That the said William Barton on or about the 2nd July 1888, upon the high seas and within the Admiralty jurisdiction of this Court, on board the British ship *Desdemona*, feloniously, wilfully and of malice aforethought, did kill and murder one William Malone, a seaman of the said ship, against the form of the statute

* Original Criminal Case, No. 2 of the 6th Criminal Sessions of 1888.

in such case made and provided and against the peace of our Lady the Queen, Her Crown and Dignity.'

"An objection was taken at the trial that the indictment ought to be amended by inserting the words 'being then a British seaman on board a British ship, to wit, the *Desdemona*' after the words 'William Barton' in the said indictment. The amendment was acceded to by the Crown, and the indictment altered accordingly.

"The Counsel for the prosecution having opened the case proposed to put in evidence,—

(1.) "The return of a Commission directed to the Chief Presidency Magistrate for the examination of the Captain, Chief and Second Officers of the said ship who were not present in this country.

(2.) "The deposition taken at the Police Court of one Benjamin Moram, sail-maker on board the said ship, who had been permitted by the Crown to leave with the said vessel.

"Such Commission had been directed by Mr. Justice Trevelyan to issue under s. 503 of the Code of Criminal Procedure.

"It was objected by the Counsel for the prisoner that, under s. 267 of the Merchant Shipping Act of 1854, he ought to be tried in every respect as if he was being tried at the Central Criminal Court in London, and more especially that the law of evidence to be applied to this case was that prevailing in England. Under the law prevailing in England, both these pieces of evidence would have been inadmissible against the prisoner.

"The 267th section of the Merchant Shipping Act of 1854 is as follows: 'All offences against property or person committed in or at any place, either ashore or afloat, out of Her Majesty's dominions by any master, seaman, or apprentice who, at the time when the offence is committed, is, or, within three months previously, has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged, in the same manner, and by the same Courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England,

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and the cost and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.

"The learned Judge admitted the evidence subject to further discussion, and such evidence was read on behalf of the prosecution accordingly.

"The prisoner was found guilty of manslaughter by the jury, and was sentenced by the Court to penal servitude for life; the learned Judge refused to reserve the point, but referred Counsel for the prisoner to myself under the 26th clause of the Letters Patent.

"The Counsel for the prisoner has appeared before me, and represented the above facts, and upon them I am of opinion that the question, whether the prisoner should have been tried under the provisions of s. 267 of the Merchant Shipping Act of 1854 (17 and 18 Vic., c. 104) according to the English law, and whether the evidence so given was admissible against him, is a doubtful one and one that should be further considered by the High Court, and I do certify.

(Sd.) G. C. PAUL,
Advocate-General."

At the hearing

Mr. *Graham* appeared for the prisoner.

The *Standing Counsel* (Mr. *Phillips*) for the Crown.

Mr. *Graham*—Under s. 267 of the Merchant Shipping Act, 1854, the prisoner should have been tried as he would have been tried had the trial been held at the Central Criminal Court in London. That section has never been amended in any way, and is still in force. There has never been a case of a seaman having been tried by a High Court in India for an offence committed on the high seas, and I submit he should have been tried as though the trial were being held at the Old Bailey.

[NORRIS, J.—No objection was taken to any part of the proceedings save the reading of the Commission and the deposition put in by the Crown.]

[WILSON, J.—Jurisdiction is not affected by procedure.]

Then I say that there was jurisdiction, but the prisoner was not

tried according to s. 267 of the Merchant Shipping Act. The words "heard and determined" mean "heard and determined according to the common law of England." *Bacon's Abridgment, Tit. Statute.*

In *Queen* v. *Thompson* (1) the majority of the Court held that in prosecuting a British subject for an offence committed on board a British ship upon the high seas, the procedure must be that of the local Court trying the case; but Phear, J., stated that s. 267 of the Merchant Shipping Act, 1854, did not apply to the case, but agreed that s. 21 of 18 and 19 Vic., c. 91, did apply, and that under that Act the procedure referred to therein meant the procedure of the ordinary original criminal jurisdiction of the Court. But it seems that s. 21 does not apply to "master, seaman or apprentices," as that section uses the words "any person" instead. In the case of *Queen* v. *Thompson* (1) he was not described as a master, seaman or apprentice. The case of *Reg.* v. *Elmstone* (2) follows Phear J.'s decision, and lays down that s. 267 applies only to seamen of British ships.

[NORRIS, J.—Neither of these sections says that when a British seaman is in Calcutta and when the Legislature say, that he shall be tried by nine jurymen, that the Court shall break the law and try him by twelve jurymen as in England.]

Where there are general and particular statutes, the general statute cannot derogate from the particular.—*Hawkins* v. *Gathercole* (3), *Garnett* v. *Bradley* (4). Section 267 has been on the Statute book since 1844, being substantially s. 58 of 7 and 8 Vic., c. 112, the preamble of which states its object, *viz.*, to afford merchant seamen all due encouragement and protection. This is an Act passed for the benefit of a particular class.

[PETHERAM, C.J.—The only question is how to construe the words "in the same manner," in s. 267. Do they not mean in the same manner as if the offence had been committed within the jurisdiction of the Court of Admiralty in England?] Section 267 controls the act of this Court.

[WILSON, J.—Does not 12 and 13 Vic., c. 96, affect the section?] That is a general statute and meets the case of persons who

(1) 1 B. L. R., O. Cr., 1.
(2) 7 Bom., Cr., 89.
(3) 24 L. J., Ch., 332.
(4) L. R., 3 App. Cas., 952.

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are not provided for by any other statute. In *Queen* v. *Anderson* (1) the whole argument was an endeavour to show that s. 267 did not apply to an American seaman on a British ship, and the offence was committed 70 miles up the Garonne. Section 21 of 18 and 19 Vic., c. 91, s. 11 of 30 and 31 Vic., c. 124, must be read together, they were all discussed in *Reg.* v. *Elmstone* (2), and Westropp, J., held that the effect of the Act of 1855 was to provide for British subjects other than seamen committing crimes on British ships, and that the Act of 1867 was to provide for British subjects committing offences on board foreign ships to which they did not belong.

The Standing Counsel (Mr. *Phillips*), for the Crown, was not called upon.

The following opinions were delivered by the Court (PETHERAM, C.J., WILSON, J., and NORRIS, J.):—

PETHERAM, C.J.—The facts are stated in the case certified by the Advocate-General, and it is not necessary to re-state them here.

It was argued before us, that, under the provisions of the Merchant Shipping Act, 1854, s. 267, the prisoner should have been tried in every respect as if he had been tried at the Central Criminal Court in London, and the cases of *Queen* v. *Thompson* (3) and *Reg.* v. *Elmstone* (2) were cited and relied on on behalf of the prisoner. As to those cases, I think it enough to say that the words relied on were *obiter dicta* only, and that in the result the Court held in each case that the prisoners were properly tried according to the procedure of the Court before which the trial took place, so that both cases are authorities against the view which was pressed upon us.

The question, however, depends upon the true construction of the statutory law. The Merchant Shipping Act, 1854, by no means contains the whole of the legislation on the subject, and when the whole of the enactments are considered, I think the matter is free from doubt.

The first statute in point of time which it is necessary to notice is 12 and 13 Vic., c 96, s. 1. That Act provides that if

(1) L. R., 2. Cr. Cas. Res., 161 (2) 7 Bom., Cr., 89.
(3) 1 B. L. R., O. Cr., 1.

any person is charged in any colony with an offence committed on the seas, he shall be dealt with there, as if the offence had been committed within the limits of the local jurisdiction of the Courts of Criminal justice of such colony.

Next in order of time comes the Merchant Shipping Act, 1854, 17 and 18 Vic., c. 104, s. 267. That section, so far as it is material to the present question, provides that all offences committed afloat against a person, by any seaman employed in any British ship, shall be inquired of, heard, and tried *in the same manner* as if such offences had been committed within the jurisdiction of the Admiralty of England.

The next statute on the subject is the Merchant Shipping Amendment Act, 1855, 18 and 19 Vic., c. 91. Section 21 provides that if any British subject charged with having committed any crime or offence on board any British ship on the high seas is found within the jurisdiction of any Court of Justice within Her Majesty's dominions, which would have had jurisdiction to try the case if the offence had been committed within its jurisdiction, shall have jurisdiction to try the case as if the offence had been committed within its jurisdiction.

The next enactment is 23 and 24 Vic., c. 88. It extends the provisions of 12 and 13 Vic., c. 96, to India.

The last enactment on the subject is contained in the Merchant Shipping Act, 1867, 30 and 31 Vic., c. 124. Section 11 of this Act provides that, if any British subject commits any offence on board any British ship or on board any foreign ship to which he does not belong, any Court of Justice in Her Majesty's dominions, which would have had cognizance of such offence, if committed on board a British ship within the limits of its ordinary jurisdiction, shall have jurisdiction to hear and determine the case.

If the whole of these enactments apply to the case of an offence committed by a British seaman on board a British ship on the high seas, it is clear that the case must be tried by the Court before which the trial takes place according to its own procedure, as both the 12 and 13 Vic., c. 96, and the Merchant Shipping Amendment Act, 1855, expressly provide that the Court to which the jurisdiction to try the case is given, shall have the same jurisdiction as if

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the offence had been committed within the limits of its local jurisdiction. And it has not been argued before us that this would not be the case, but it has been contended that as s. 267 of the Act of 1854 is for the benefit of, or at least has reference to, a particular class, the general legislation contained in the other statutes cannot operate to control the effect of that section. I cannot accede to this argument, because I think that the section is only a part of the legislation intended to give various Courts in Her Majesty's dominions jurisdiction to try offences committed on the high seas, and is not for the benefit of any particular class. I think, however, that even if s. 267 is read alone, it does not bear the construction sought to be placed upon it by Mr. *Graham*. If the section is read without any portion of it, except those which relate to the expression "*in the same manner*," it will read that offences committed by seamen employed in a British ship afloat, out of Her Majesty's dominions, shall be tried *in the same manner* as if the offence had been committed within the jurisdiction of the Admiralty of England. This in my opinion must mean, shall be tried by the same Court which would have tried the case if the offence had been committed within the jurisdiction of the Admiralty of England, but does not in any way affect the practice of the Court to which the jurisdiction is given. For these reasons I think that the prisoner was properly tried according to the ordinary practice of this Court, and that the evidence was properly admitted.

WILSON, J.—I am of the same opinion, and I think that, when the statutes are looked at in their natural connection, there cannot be any doubt about the matter.

The question before us is, whether the prisoner ought to have been tried, not according to the course of procedure followed by our own Court, but by such a course of procedure as would have been followed by the Courts which ordinarily exercise criminal jurisdiction in England in cases within the jurisdiction of the Admiralty.

There are two Acts which deal with the general question as to how criminal offences, committed within the jurisdiction of the Admiralty, are to be tried here and elsewhere. The first is

12 and 13 Vic., c. 96, which, in its first section, provides in substance that criminal offences committed within the jurisdiction of the Admiralty are to be tried in any Colonial Court, in the same manner as if the offence had been committed within the ordinary jurisdiction of such Court. Then there is Act 23 and 24 Vict., c. 88, which extends this provision to India, declaring that India is to be regarded as a colony within the meaning of the earlier Act.

These Acts have been construed both by this Court in *Queen* v. *Thompson* (1) and by the Bombay High Court in *Reg.* v. *Elmstone* (2), and it seems to me that the effect of these cases, so far as procedure is concerned, is to say that offences committed within the jurisdiction of the Admiralty are to be tried by the Indian Courts according to the course of their own procedure.

Having thus ascertained the general rule for the trial of offences committed within the jurisdiction of the Admiralty, we come next to the particular provisions in the several Merchant Shipping Acts which deal with cases which either do not or may not fall within the ancient jurisdiction of the Admiralty.

The first of these is the section of the Merchant Shipping Act, 1854, 17 and 18 Vic., c. 104, upon which reliance has been placed, namely, s. 267. This section deals with cases which might or might not fall within the Admiralty jurisdiction. It deals with offences committed by British seamen either ashore or afloat out of Her Majesty's dominions. The next Act is the Merchant Shipping Act, 1855, 18 and 19 Vic., c. 91, s. 21, which goes a step further and deals with offences committed by any British subject on board a British ship on the high seas or in a foreign port, or by a foreigner on board a British ship on the high seas. And s. 11 of the Merchant Shipping Act, 1867, 30 and 31 Vic., c. 124, goes on to create a further extension because it includes cases not only of offences committed on board British ships but offences committed by British subjects on board foreign ships to which they do not belong. It seems to me that the real intention of these sections is not to interfere with the course of procedure laid down in the General Act, 23

(1) 1 B. L. R., O. Cr., 1. (2) 7 Bom., Cr., 89.

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and 24 Vic., c. 88, but to secure that, in cases analogous to those of offences committed within the jurisdiction of the Admiralty, though not strictly within it, the same rules of procedure shall apply.

NORRIS, J.—I am of the same opinion and substantially for the reasons given by my brother Wilson.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

1889 *February* 8.

POREESH NATH MOJUMDAR (DEFENDANT) *v.* RAMJODU MOJUMDAR AND ANOTHER (PLAINTIFFS).°

Redemption, right of—Foreclosure decree—Order absolute—Redemption of mortgage before order absolute—Transfer of Property Act (IV of 1882), *s.* 87.

In a foreclosure action, the mortgagor can redeem at any time until the order absolute is made under s. 87 of the Transfer of Property Act, 1882.

ON the 4th January 1886 Ramjadu Mojumdar and another (mortgagees) obtained an *ex-parte* decree for foreclosure under s. 86 of the Transfer of Property Act, 1882, against Poresh Nath Mojumdar (the mortgagor), six months' time being allowed for the payment of the mortgage debt. The six months provided in the decree expired on the 4th July 1886, and the mortgage debt was not repaid. The mortgagees, without having previously obtained an order under s. 87 of the Transfer of Property Act 1882, making the foreclosure decree absolute, obtained an order for possession of the mortgaged property in December 1886, and got possession accordingly on the 14th January 1887.

In May 1887 the mortgagor Poresh Nath Mojumdar made an application to the Munsiff of Jhenidah to be allowed to redeem the mortgaged property, having paid the amount of the mortgage debt and costs into Court. The Munsiff was of opinion that the order of December 1886, giving possession to the mortgagees, was illegal, according to the provisions of s. 87 of the

° Appeal from Order No. 380 of 1888, against the order of F. E. Pargiter, Esq., Judge of Jessore, dated the 28th of June 1888, reversing an order of Baboo Bunwari Lal Bannerjee, Munsiff of Jhenidah, dated the 5th of May 1888.